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No. 80-668

IN THE

Supreme Court of the United States

October Term, 1980

WESTERN AIR LINES, INC.,

Petitioner,

vs.

INTERNATIONAL TRAVEL ARRANGERS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did Western Air Lines, Inc. unlawfully exercise its monopoly power and thereby violate Section 1 and/or Section 2 of the Sherman Act when it forced a competitor from the market place?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, International Travel Arrangers, Inc., respectfully requests that this Court deny the Petition for review of the opinion of the United States Court of Appeals for the Eighth Circuit entered on June 10, 1980.

STATEMENT OF THE CASE

This case is about the exercise of monopoly power to thwart competition. It is not about the technical requirements of the TGC regulations; nor is it about advertising *qua* advertising, false, misleading, deceptive or otherwise. The Court of Appeals, in affirming, held that Western violated Sections 1 and 2 of the Sherman Act. In so doing, each of Western's legal and factual contentions was addressed and resolved in favor of the judgment. The Court of Appeals reviewed the record beyond the issues raised by Western; *sua sponte*, it examined whether the anti-TGC campaign violated Section 1. (623 F.2d at 1267) Issues deemed so unimportant by Western in the Court of Appeals, are now the focus of the Petition for *certiorari*.

FACTS OF THE CASE

1. The TGC.

Charter air transportation has long been authorized and regulated by the Civil Aeronautics Board ("CAB"). Prior to September, 1972, the most popular charter concepts contained restrictions which made those concepts non-competitive with single ticket, regularly scheduled service. (Findings 1b-d, 65-66, App. 2d, 13d.)[1]

The CAB, in September 1972, authorized the first true public charter, the Travel Group Charter ("TGC"), 14 C.F.R. §372a. *et seq*. The TGC allowed point-to-point transportation, could be advertised to the general public, and was sold on an individually ticketed basis with a definite departure and return. The regulations set forth detailed conditions which all TGC organizers were obligated to observe. (Findings 1a, 65; App. 2d, 13d.)

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[1] References to "App." are to Petitioner's Appendix.

The TGC was adopted to satisfy the "irresistible and understandable public demand for low cost air transportation." (CAB order adopting 14 C.F.R. §372a.; Finding 1a, App. 2d) The TGC combined the full-plane economies of charters and the single-ticket service sold directly to the public of regularly scheduled service. For the first time a charter organizer could organize a program incorporating back-to-back flights, (i.e., deliver one group, pick-up the previous group, etc.) introducing further economies of volume buying and the elimination of ferry legs.

Just as importantly, the TGC allowed entreprenurial freedom in pricing and packaging. Id. §372a.10. (See, Findings 70-85; App. 14d-18d which illustrate the mechanics.)

Within days of adoption of the regulations, International Travel Arrangers ("ITA") and a co-organizer, the Minnesota State Automobile Association, ("MSAA"), a large travel agent operating statewide in Minnesota, jointly organized a TGC pattern of three flights to London for departure in spring and early summer, 1973. Due to public demand for tickets and availability of aircraft, the program was enlarged to seven flights. The success in selling this program led ITA and MSAA to immediately plan for a greatly expanded program for 1974. (Finding 57, App. 4c-d.)

2. Western and Its Market Power.

Western Air Lines, Inc. ("Western"), as is here relevant, services Hawaii and Las Vegas from the Twin Cities. Western is the only carrier to provide regularly scheduled nonstop and direct service[2] between the Twin Cities and Las Vegas, Nevada. (Findings 1b, 28; App. 3d-9d.)

The airline industry defines a market as any two city pairs, i.e., Twin Cities/Hawaii or Twin Cities/Las Vegas, a

[2] Direct service is single plane service with intermediate stops.

definition Western does not contest. The Twin Cities/Hawaii market is dominated by Western. Western's share of that market grew from 56.8% in 1970 to 68.6% in 1973. Western controlled virtually 100% of the traffic on the Twin Cities/Las Vegas route. (Findings 63-64, 67; App. 13d.)

Western exploited its Twin Cities/Las Vegas monopoly in a way which gave it enormous leverage in dealing with travel agents. (Findings 28-40; App. 9d-10.) In 1970, in response to affinity charter activity, Western adopted a promotional "Group 60" fare on that route. A travel agent favored by Western could reserve 60 or more seats (usually more, to protect against cancellations). Air transportation was combined with Las Vegas accommodations by the travel agent who made both a commission on the transportation and a mark-up on the accommodations. The package price was not much greater than the single seat regularly scheduled air fare. The result was an object lesson in the law of demand; the low-priced packages greatly increased demand.

Western, however, was ill-equipped to take full advantage of the bonanza. Because it was aircraft-short it could not accommodate the demand for blocks of seats from all requesting travel agents. Thus, Western allocated space. By 1972 Mainline Travel and MSAA emerged as the most preferred. The District Court found that:

> "40. The supply imbalance gave Western the market power leverage to impose its wishes on those travel agents already favored or looking to become favored."

Early-on, Western perceived that the TGC would be effective competition for its regularly scheduled service. The Petition admits that Western could not compete pricewise. Equally important, Western was aircraft-short and thus could not charter aircraft to TGC organizers. (Finding 8; App. 9d.)

3. Western's Illegal Use of Its Market Power.

Western's first head-to-head encounter with TGC competition occurred in its West Coast cities/Hawaii markets. With active and expert collaboration of its advertising agency, Batton, Barton, Durstine & Osborne (BBD&O) Western initiated the anti-TGC campaign. (Findings 9-14; App. 4d-5d.)

Western knew that TGC competition would be stiffer in the Twin Cities than it had been on the West Coast (Finding 18; App. 5d-6d) and, thus, closely monitored TGC activity in the Twin Cities. It voiced its displeasure to both Mainline and MSAA executives. Early in the planning stages of the ITA/MSAA 1974 program, MSAA executives discussed among themselves the possibility that Western would punish MSAA by reducing or eliminating its preferred "Group 60" status. (Findings 15-16, 41-42; App. 5d, 10d.)

In June 1973, ITA and MSAA agreed on a 1974 TGC program to Hawaii, Mexico and London. In September ITA/MSAA commenced advertising Hawaii and Mexico TGCs for March and April, 1974 departure. London was agreed upon, but promotion would come later because of the later departure dates. (Finding 7; App. 4d, 15c.)

By August 1973, Western realized that TGC competition in the Twin Cities was effective. Twin Cities personnel advised higher-ups that "the travel agent industry is looking to Western Airlines for a reaction," and recommended a Minnesota anti-TGC campaign. (Finding 7, 19; App. 5d-6d.)

4. Exclusionary Effect and Injury to Competition.

The anti-TGC campaign was clearly exclusionary. The campaign influenced travel agents to refuse to sell TGCs; and, by false, misleading, and deceptive advertising it created a negative public reaction to the TGC.

Western was virtually assured that the anti-TGC campaign would work. Travel agents would support the campaign. After all, Western had an "inclination" that travel agents expected Western to so react; certainly, travel agents seeking "Group 60" seats would respond favorably. Western also knew that its West Coast efforts to stifle TGC competition had successfully created a negative attitude about TGCs in the mind of the consumer. (Finding 14, App. 5d.) The same negative attitude could be expected in Minnesota.

MSAA executives believed the anti-TGC campaign would doom the ITA/MSAA program. (Finding 48; App. 11d.) At a meeting sought by MSAA, Western threatened MSAA with elimination of preferential treatment in allocation of Group 60 seats unless MSAA ended its TGC activities. (Findings 49-55; App. 11d-12d.) Shortly thereafter MSAA cancelled the Hawaii TGCs, the Mexico TGCs, and finally, the London TGCs. (Findings 53-55; App. 12d.)

The District Court made detailed findings on causation and damages which were adopted by the Court of Appeals. (Findings 43-47, 52-54, 69; App. 11d, 12d, 14d, 12e.) 627 F.2d at 1271. The findings on causation demonstrate injury to competition caused by Western's conduct, and were so relied on by the Court of Appeals. 623 F.2d at 1268, 1271-1272. (See discussion at pp. 8-10, 13-15 *infra*.)

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1) The resolution of Western's Question 3[3] in favor of the judgment moots Western's Questions 1 and 2. Question 3 asks this Court to re-weigh the record and overturn the Findings of the District Court, affirmed by the Court of Appeals, that Western used the market power of its Twin Cities/Las Vegas route to force ITA/MSAA out of the TGC business.

Should this Court properly refuse that invitation, Western argues that its violation of Section 2 by use of that market power (that is, ignoring, in Western's construct, the exclusionary effect of the anti-TGC campaign) does not support the entire damage award. That argument is factually unsupportable. Furthermore it ignores the principle often repeated by this Court, that the wrongdoer must bear the burden of uncertainty of amount of damages where the wrongful conduct causes uncertainty.

2) The anti-TGC campaign was used to willfully maintain Western's monopoly in the Twin Cities/Hawaii market. Section 2 proscribes exclusionary conduct by a monopolist. Such conduct need not be a separate violation of Section 1. The judgment is correct because the anti-TGC campaign and the threat, considered separately and together, illegally maintained Western's monopoly power. This analysis renders moot Western's Questions 1 and 2.

3) Nonetheless, the decision of the Court of Appeals is correct in holding the anti-TGC campaign to be a violation of Section 1 and that BBD&O was a co-conspirator.

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[3] "3. Whether there was a total failure of appellate review of the sufficiency of evidence on the issue of market leverage?"

I. THE JUDGMENT IS CORRECT AND SUPPORTABLE ON THE ISSUE THAT WESTERN'S USE OF THE MONOPOLY POWER OF ITS LAS VEGAS ROUTE TO EXCLUDE COMPETITION WAS PROVEN: AS A MATTER OF LAW THAT CONDUCT VIOLATED SECTION 2.

A. Western's Illegal Use of Leverage Was Proven.

The findings of the District Court show the enormity of Western's monopoly power from the Las Vegas route and its manipulation of travel agents through that power. The District Court found, and the Court of Appeals agreed that Western used that power to drive ITA/MSAA from the TGC market:

> ". . . The evidence includes the fact that the power of leverage by Western was established; that there was evidence presented from which the Special Master may have concluded that such leverage had been used in the past; that it was established that MSAA had an 'awareness' of the leverage and power that Western possessed; that Zumbrunen's testimony [Western's Regional headman] revealed that the subject of the Group 60 Fare seats and Western's Hawaii market were both discussed at the meeting; [and that thereafter, the ITA/MSAA TGCs program for 1974 was cancelled]." 623 F.2d at 1269-1270.

The Petition, pp. 27-28, argues a complete failure of appellate review on this factual issue. The above quote, to the contrary, shows painstaking review of the record.[4] Just as importantly, the Court correctly recognized the proper scope of its appellate function,[5] which the Petition ignores.

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[4] "We are satisfied that there is sufficient evidence to support the Special Master's findings." 623 F.2d at 1269.

[5] "It is not our function to try this case de novo, to pass upon credibility of witnesses or to determine the weight to be given to any particular testimony." 623 F.2d at 1270.

B. Violation of §2; Injury and Damages.

Western's attack[6] on the Court of Appeals ignores the plain language of the opinion. The Court of Appeals found that the use of leverage violated Section 2. 623 F.2d at 1270. The Court also held that the anti-TGC campaign contributed to the illegal maintenance of monopoly power, and, thus, also violated Section 2.[7] Blatant misstatement should not be the "stuff" on which the jurisdiction of this Court is sought.

The Court of Appeals correctly held that the use of Las Vegas route leverage to remove ITA/MSAA from the market violated Section 2 as a matter of law. *Accord: Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275-276 (2nd Cir. 1979). Indeed, Western does not challenge this proposition.[8]

Withdrawal by MSAA ended the 1974 program. ITA was dependent on MSAA financing and administering the program. (Finding 7.) This reality is reflected in the profit split; 80% was to go to MSAA. Moreover, the Special Master, in the Memoranda which accompanied the findings, said:

> "ITA was unable to market TGCs without the assistance of MSAA; therefore, plans for their joint 1974 TGC program had to be cancelled." (App. 14e.)

Any doubt that the illegal use of the Las Vegas route market power caused MSAA's withdrawal must be resolved against Western.[9] This Court, in *Bigelow v. RKO Radio*

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[6] Petition, pp. 27-28.

[7] The Court of Appeals was obviously pointing out that not every violation of Section 1 by a monopolist results in willful maintenance of monopoly power, and thus, a violation of Section 2. For instance, a monopolist who conspires with its chain of distribution to fix resale prices at a high level will leave room for a new entrant who can charge a lower price. Thus, the *per se* Section 1 violation may actually encourage entry.

[8] "If the judgment could be supported by this holding alone, *certiorari* might not be appropriate." Petition, p. 27.

[9] Again, Western's construct, Petition, pp. 27-28, totally ignores the anti-TGC campaign.

Pictures, Inc., 327 U.S. 251 (1946) and in its progeny,[10] has firmly adhered to the principle that:

> "The most elementary conception of justice and public policy requires that the wrongdoer shall bear the risk of uncertainty which his own wrong has created." 327 U.S. at 265.

Thus, the judgment is correct. There is no need to examine any other issue.

II. THE ANTI-TGC CAMPAIGN WAS EXCLUSIONARY IN PURPOSE AND EFFECT AND THUS AN UNLAWFUL EXERCISE OF MONOPOLY POWER.

A. Applicable Antitrust Principles.

It is a fundamental principle of antitrust law that acts to accomplish the unlawful ends of unreasonable restraint of trade or monopolization need not be unlawful. This Court has so stated often and emphatically. E.g., "If the end result is unlawful, it matters not that the means used in violation may be lawful." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972); ". . . [I]t is well settled that acts which are in themselves legal lose that legal character when they become elements of an unlawful scheme." *Continental Ore Co. v. Union Carbide & Carbon Corp., supra*, at 707. *Accord: American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946). A monopolist who has lawfully acquired monopoly power "is tolerated but not cherished."[11] Thus any exclusionary conduct by one possessing monopoly power is proscribed by the antitrust laws.

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[10] E.g. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

[11] *Berkey Photo, Inc., supra*, at 274.

> "In sum, although the principles announced by the §2 cases often appear to conflict, this much is clear. The mere possession of monopoly power does not *ipso facto* condemn a market participant. But, to avoid the proscriptions of §2, the firm must refrain at all times from conduct directed at smothering competition. This doctrine has two branches. Unlawfully acquired power remains anathema even when kept dormant. And it is no less true that a firm with a legitimately achieved monopoly may not wield the resulting power to tighten its hold on the market." *Berkey Photo, Inc., supra,* at 275.

Accord: Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342 (5th Cir. 1980); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.,* 627 F.2d 919 (9th Cir. 1980).

The Court of Appeals correctly held the anti-TGC campaign a violation of Section 1. Section 2, however, only requires that the anti-TGC campaign be significantly exclusionary. The conclusion that the anti-TGC campaign willfully maintained Western's monopoly power satisfies Section 2 requirements.[12] 623 F.2d at 1270.

B. The Anti-TGC Campaign.

The Court of Appeals recognized that the anti-TGC campaign was not constitutionally protected. 623 F.2d at 1267, n. 14. ". . . [I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced,

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[12] The Court's Section 2 holding cites both the anti-TGC campaign and the use of leverage on MSAA as violating Section 2. See, *supra,* pp. 8-10, where the leverage issue is fully discussed.

or carried out by means of language, either spoken, written or printed." *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490, 502 (1949), cited with approval in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) and *California Motor Transport Co. v. Trucking Unlimited, supra.*

Nor is it a novel proposition that the written and spoken word can be used to exclude competition, thus violating the antitrust laws. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). If a publicity campaign, ostensibly directed at the government, is a mere subterfuge to interfere with a competitor's business, the antitrust laws are operative:

> "There may be situations in which a *publicity campaign*, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified . . ." 365 U.S. at 144. [emphasis added]

Accord: California Transport Motor Co. v. Trucking Unlimited, supra.

The anti-TGC campaign was admittedly aimed at the travel agents and the buying public. 623 F.2d at 1268. The campaign successfully interfered with competitors' access to the market place.

In *F.T.C. v. Procter & Gamble Co.*, 386 U.S. 568, 579 (1966), and *American Tobacco Co. v. United States, supra*, at 797 this Court recognized that advertising can have anti-competitive and exclusionary effects which are reached by the antitrust laws. See also, *Purex Corp. v. Procter & Gamble Co.*, 596 F.2d 881, 887 (9th Cir. 1979). Recently, *Hunt-Wesson*

Foods, Inc. v. Ragu Foods, Inc., supra, clearly articulated the reason:

> ". . . [T]he question presented is whether any market could exist consistent with the allegations of Hunt's complaint, in which Ragu's non-price related activities could have contributed to an anticompetitive effect. Assuming the existence of some market power, Ragu's conduct could have made Hunt's entry into the market more difficult and costly, to the detriment of competition generally." 627 F.2d at 927.

C. Exclusionary Effects of the Anti-TGC Campaign: Injury to Competition.

The anti-TGC campaign was significantly exclusionary, and, thus injurious to competition on two levels. First, Western's conduct blocked access to travel agents; second, it created a negative reaction to TGCs in the mind of the public.

The District Court found that Western's Las Vegas route gave it leverage "on those travel agents favored *or looking to become favored.*" (Finding 40.) Western announced the anti-TGC campaign to the travel agents with the "Dear Partner in Travel" letter, enclosing a copy of the ad. 623 F.2d at 1261. This effectively closed the travel agents' door to TGCs.

Mainline, one of the other companies in the market, had been successful "wholesaling" blocks of seats to smaller travel agents. The "Dear Partner in Travel" letter and the ad ended that. (Finding 56.)

This vividly documents the coercive effect Western's conduct had on the travel agents. Western's control of the Twin Cities/Las Vegas route gave it power to bestow favors on

travel agents who cooperated. Western's conduct created a barrier to entry to travel agents for the TGC operators.[13]

Secondly, the ad negatively affected the consumer, (Findings 43-45. 623 F.2d at 1271)[14] in effect, creating a consumer boycott of the TGC.

The Court of Appeals was primarily concerned with the anticompetitive effect of Western's conduct. It did, however, examine the purpose and intent behind the anti-TGC campaign, and properly so.

Western's admitted intent[15] to stop competition from TGCs is important for a number of reasons. That intent reflects the successful anti-TGC campaign on the West Coast, and, thus, sheds light on the effect it had in Minnesota. Intent also explains any ambiguity of conduct. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n. 13; *Berkey Photo, Inc., supra,* at 288. Anti-competitive intent identifies purpose and, thus, negatives any claim to legitimacy of that purpose in terms of antitrust objectives. The Court of Ap-

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[13] The Petition at page 5 describes travel agents as "the independent distributors of the travel industry." This description highlights just how important the travel agents were to TGCs.

[14] Western's heavy reliance (Petition, pp. 21-22) on the discussion in *Berkey Photo, Inc., supra,* p. 288, n.41 is misplaced. First, the anti-TGC campaign had a demonstrated *substantial* adverse effect on competition. Second, the campaign disparaged competition rather than bathing Western's product in its best light. Third, Kodak's puffing created no barriers to entry; Western's anti-TGC campaign did. Fourth, Kodak was introducing a new innovative product; Western sought to protect itself from effective price competition from a new and innovative product, i.e. TGCs.

Furthermore, Western can not excuse its conduct by assailing ITA/MSAA advertising. (Petition, p. 20 n.7.) The District Court specifically refused to rule ITA's advertising in anyway deficient. (Conclusion of Law 23, App. 20d). The TGC was new; the ITA/MSAA combine without any market power. That the TGC was "bathed in the best light possible" was pro-competitive; that created no barriers to entry. *Berkey Photo, Inc., supra,* at 287.

[15] "58. Western's purpose in embarking on its anti-TGC campaign in the Twin Cities and other Minnesota cities was to prevent the TGC's from becoming a competitive threat in this area." (App. 12d).

peals, thus, properly examined Western's intent in terms of antitrust objectives. Western's admitted anti-competitive intent belies the argument of the Petition that the anti-TGC campaign was pro-competitive. Nothing in the record supports Western's *ipsi dixit* statement that because advertising is a means of competition, the anti-TGC campaign was therefore pro-competitive.

The Petition ignores the manifest exclusionary effect of the anti-TGC campaign. Even characterization of the anti-TGC campaign as "garden variety" unfair competition is unnecessary. Exclusionary conduct need not amount to a business tort. *Associated Radio Service Co. v. Page Airways Co., supra,* at 1353, 1356 n. 23. The touchstone is demonstrated exclusionary effect;[16] that the record here shows such effect is beyond question. 623 F.2d at 1272.

The decision of the Court of Appeals will have no inhibiting effect on the use of advertising as a means of competition. Advertising and publicity campaigns such as the anti-TGC campaign have met the antitrust laws before, without any noticeable chilling effect on advertising.[17]

The Court of Appeals aptly termed the anti-TGC campaign "a full frontal attack." It manifestly contravened "Sherman Act values"[18] in its anti-competitive, exclusionary effect.

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[16] The law's nexus is a "touchstone." The proof of exclusionary effect in this case is a "millstone" around Western's neck.

[17] See cases cited at pp. 13-14, *supra.* Neither have these cases led to a deluge of antitrust litigation.

[18] *Associated Radio Service Co. v. Page Airways, Inc., supra,* at 1351.

III. THE ANTI-TGC CAMPAIGN VIOLATED SECTION 1; BBD&O WAS PROPERLY HELD TO BE A CO-CONSPIRATOR.

A. Section 1.

Since this Court's decision in *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the rule of reason has been examined many times in the context of competitor cases. The cases are in accord that the relevant issues are definition of the market, the competitive mix in the market, the nature of the illegal conduct and the intent of the defendant, and whether competition has been injured. Recent cases which explore this analysis include *Associated Radio Service Co. v. Page Airways, Inc., supra*; *Franklin Music Co. v. American Broadcasting Companies*, 616 F.2d 528 (3d Cir. 1979); and *Northwest Power Products, Inc. v. Omark Industries*, 576 F.2d 83 (5th Cir. 1978).

The Petition presents no questions as to definition of the markets and competitive mix in those markets. The Petition challenges the assessment of the several courts below that the anti-TGC campaign was significantly exclusionary and injured competition.[19]

Furthermore the Petition fragments the anti-TGC campaign, trying to justify each aspect. Western's scheme must be viewed in its entirety and ITA given ". . . the full benefit of [its] proof without tightly compartmentalizing the various

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[19] Why so much of the Petition is devoted to trying to demonstrate the truthfulness of the September 16th ad is not readily answerable. The Findings relating thereto were properly affirmed. As the Special Master found:

> "59. Its [Western's] purpose was not to merely inform the public or speak out on a political issue. If such had been the case, a substantially misleading or deceptive campaign would have been unnecessary." (App. 12d).

factual components and wiping the slate clean after scrutiny of each . . ." *Continental Ore Co., supra,* at 699. The Court of Appeals obviously followed that admonition.

That the anti-TGC campaign was exclusionary is discussed, *supra,* at pp. 5-6, 14-15. Injury to competition was shown in that every TGC operator felt the sting of the anti-TGC campaign and ITA/MSAA was driven from the market altogether. The public was injured by being deprived of a lower priced alternative to regularly scheduled service. This, indeed, is profound injury to competition.[20]

B. BBD&O.

In *United States v. General Motors Corp.,* 384 U.S. 127 (1966), this Court said one conspires to violate the antitrust laws when one participates in "joint and collaborative action . . . pervasive in the initiation, execution and fulfillment of the plan." *Id.,* at 142-143. The Findings show such action and the Court of Appeals correctly affirmed. The discussion of this issue by the Court of Appeals is complete; there is no reason to lengthen this brief by reproducing that discussion.

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[20] *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.,* 429 U.S. 477 (1977) is inapposite. The exclusionary conduct, found illegal, caused injury. The amount is for the trier of fact. Furthermore, the argument at p. 23 of the Petition ignores this Court's injunction that plaintiff's case not be fragmented. *Continental Ore Co., supra* at 699.

CONCLUSION

For the foregoing reasons the Petition should be denied.

Respectfully submitted,

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